Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

JOSEPH LISANTI, JR.,

Petitioner,

V.

SHERRY DIXON,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner Joseph Lisanti, Jr. suffered a violation of his due process rights under the United States Constitution when the Texas Supreme Court failed to redress the *sua sponte* decision of the Court of Appeals, Fifth Appellate District of Texas, to affirm a punitive damages award against Lisanti based on a time-barred cause of action expressly abandoned at trial?

2. Is the Texas *Sabine Pilot* public policy exception to employment at-will doctrine void for vagueness to the extent that the Texas Supreme Court failed to delineate the available measure of damages thereby violating constitutional due process protections?

IDENTITY OF PARTIES AND THEIR COUNSEL

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Sup. Ct. R. 14, Petitioner, Joseph Lisanti, Jr. ("Lisanti") lists the parties — and their counsel — to the Texas Supreme Court's ruling sought to be reviewed:

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OPINIONS BELOW

A copy of the Official Notice from the Supreme Court of Texas ("Texas Supreme Court") denying Lisanti's Petition for Review appears at Appendix A to the petition. The Official Notice from the Supreme Court of Texas denying Lisanti's Motion for Rehearing appears at Appendix E to the petition.

The Opinion of the Court of Appeals, Fifth Appellate District of Texas at Dallas ("court of appeals"), on Lisanti's appeal from the trial court's judgment appears at Appendix B to the petition and is reported at 147 S.W.3d 638 (Tex. App. — Dallas 2004, pet. denied). The Order of the court of appeals denying Lisanti's Motion for Rehearing appears at Appendix F to the petition.

The Final Judgment of the 14th Judicial District Court, Dallas County, Texas ("trial court"), appears at Appendix C to the petition. The Findings of Fact and Conclusions of Law rendered by the trial court appear at Appendix D.

JURISDICTION

The trial court entered Final Judgment in the case below on May 23, 2003. Lisanti timely appealed to the court of appeals, which affirmed the judgment of the trial court on September 9, 2004. The court of appeals denied Lisanti's Motion for Rehearing on October 26, 2004. Lisanti timely filed a Petition for Review with the Texas Supreme Court that was denied on October 14, 2005, followed by a denial of his Motion for Rehearing on January 27, 2006.

Having exhausted his available means of redress through the highest Texas state court, Lisanti invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution, in relevant part, guarantees "due process of law" before an individual may be deprived of property.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. RESPONDENT ABANDONS HER ASSAULT CLAIM AT TRIAL, AND THE TRIAL COURT ENTERS JUDGMENT FOR RESPONDENT

On or about April 16, 2001, Respondent filed suit solely alleging a *Sabine Pilot* wrongful discharge cause of action.[1] Respondent claimed that her former employer — New Jersey Trucking Corp. — its corporate affiliates, and Lisanti, who was then the President of each corporate entity, terminated Respondent's employment solely for refusing to commit illegal acts. On or about November 27, 2002, Respondent filed a Second Amended Petition, incorporating an assault claim against Lisanti individually.

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[1] *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (1985) (creating an exception to the at-will employment doctrine in Texas that proscribes employers from terminating employees for refusing to perform an illegal act).

At the outset of trial, Respondent voluntarily abandoned her assault claim after conceding that it was barred by the statute of limitations. Specifically, during opening statements, Respondent's counsel stated the following: **"Now, Your Honor, we are going to concede, however, that we are not proceeding on the separate assault case, the separate tort of assault, because of limitations issues."** (Appendix H, Tr. Vol. 2, p. 7, ¶¶7-10) (emphasis added).[2] When Respondent subsequently sought to introduce testimony related to assaultive conduct, Lisanti understandably objected because the assault claim was no longer before the court. (Appendix H, Tr. Vol. 2, p. 70, ¶¶16-21). The trial court overruled the objection only after Respondent's counsel confirmed that the evidence was not being elicited to demonstrate assault but to establish Respondent's mental anguish. (Appendix H, Tr. Vol. 2, pp. 70, ¶¶25 - 71 ¶¶1-2).

After a bench trial, the district court found in favor of Respondent, concluding that she was wrongfully terminated in violation of *Sabine Pilot*. (Appendix D, Trial Court's Conclusions of Law, p. 3). On Respondent's *Sabine Pilot* claim, the district court awarded $100,000.00 in actual damages, jointly and severally against her former employer New Jersey Trucking Corp. and Joseph Lisanti, Jr., and $400,000.00 in punitive damages — $200,000.00 against New Jersey Trucking Corp. and an additional $200,000.00 against Lisanti individually.

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[2] The Trial Transcript will be cited herein as "Tr. Vol. _____, p. _____, ¶."

II. The Court of Appeals Imputes A Constitutional Due Process Error That the Texas Supreme Court Fails to Redress

Lisanti timely appealed to the Court of Appeals, Fifth Appellate District of Texas at Dallas, which affirmed the trial court's decision. On appeal, Lisanti specifically raised issues related to the award of punitive damages under *Sabine Pilot* — the *sole* cause of action before the trial court — because the Texas Supreme Court has not stated whether punitive damages are available for *Sabine Pilot* violations.[3] Indeed, its precedent provides inconsistencies irreconcilable with the punitive damages awarded against Lisanti, suggesting that the correct measure of damages for a *Sabine Pilot* wrongful termination are contractual in nature.[4]

Lisanti's appeal was understandably silent on punitive damages in reference to Respondent's assault cause of action because she unambiguously abandoned that claim in the trial court. However, absent any argument from Respondent, the court of appeals resurrected her abandoned assault claim to

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[3] *Sabine Pilot*, 687 S.W.2d at 735, 736 ("Finally, because of the limited issues presented in this case, ***the court does not address the matter of Hauck's measure of damages.***") (Kilgarlin, J., concurring) (emphasis added).

[4] *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 75 (Tex. 1989), *rev'd and withdrawn on other grounds*, 807 S.W.2d 577 (Tex. 1991), (Gonzales, J., dissenting) ("The general rule as to the correct measure of damages for wrongful discharge of an employee is the present cash value of the contract to the employee . . . less any amounts that he should in the exercise of reasonable diligence be able to earn through ordinary employment") (citing *Greater Fort Worth & Tarrant County Cmty. Action Agency v. Mims*, 627 S.W.2d 149, 151 (Tex. 1989)).

affirm the trial court's $200,000.00 punitive damages against Lisanti:

> Lisanti's argument focuses on his contention that Dixon's Sabine Pilot claim is contractual in nature rather than a tort. Lisanti fails to address, however, that Respondent's petition included a claim for assault . . . Lisanti does not challenge the sufficiency of the evidence supporting the trial court's findings on assault. Therefore, the trial court's award of punitive damages is supported by a finding of a distinct tort. *Lisanti v. Dixon*, 147 S.W.3d 638, 645 (Tex. App. — Dallas 2004, pet. denied) (emphasis added); (Appendix B).

Lisanti filed a Motion for Rehearing with the court of appeals, cogently clarifying that Respondent unequivocally abandoned the assault cause of action and arguing, therefore, that affirming the punitive damages award based on that defunct claim was erroneous. The court of appeals denied Lisanti's Motion for Rehearing in a one-sentence order with absolutely no discussion of the egregious error that it *sua sponte* interjected. (Appendix F).

Lisanti timely filed a Petition for Review with the Texas Supreme Court in which he argued that the court of appeals erroneously affirmed Respondent's punitive damages award in relying on the abandoned assault claim. On October 14, 2005, the Texas Supreme Court denied his petition. (Appendix A). Thereafter, Lisanti filed a Motion for Rehearing expressly elucidating the constitutional due process ramifications of the Texas Supreme Court's failure to redress the court of appeals' erroneous decision to levy punitive damages against Lisanti based on a cause of action that was not — and indeed could not be — adjudicated. The Motion for Rehearing likewise raised the alternative due process argument that

the *Sabine Pilot* doctrine is void for vagueness to the extent that it fails to delineate the damages available thereunder. Indifferent to the constitutional due process violations precipitated by its acquiescence in the court of appeals' erroneous decision, the Texas Supreme Court summarily denied Lisanti's Motion for Rehearing without discussion. (Appendix E).

SUMMARY OF THE ARGUMENT

Squarely confronted with the critical unresolved question of whether punitive damages are available for *Sabine Pilot* violations, the court of appeals and the Texas Supreme Court wholly pretermitted the issue rather than clarifying the law accordingly. The means by which they did so — upholding a $200,000.00 punitive damages award based on a time-barred assault claim that Respondent voluntarily abandoned at the onset of trial — memorialized error of a constitutional magnitude. Thus, the courts have upheld a punitive damages award against Lisanti in violation of his constitutional due process rights. Alternatively, by refusing to delineate the damages available under *Sabine Pilot,* the law is void for vagueness and therefore violates constitutional due process protections.

REASONS FOR GRANTING WRIT

III. Punitive Damages May Not Be Awarded In Violation of Federal Due Process Protections

"Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). Indeed, unlimited jury or judicial discretion "in

the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. Due process is one such sensibility.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Id.* at 63 (O'Connor, J., dissenting) (internal quotations and citations omitted). *See also, State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive *or arbitrary* punishments on a tortfeasor.") (emphasis added) (citations omitted). The risk of caprice is particularly prevalent when punitive damages are at issue, and capricious influences "are antithetical to the rule of law." *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443, 475 (1993) *("TXO")* (O'Connor, J., dissenting). Due process protects defendants against capricious government action by placing limitations on punitive damages awards if they were reached "in proceedings lacking the basic elements of fundamental fairness." *Haslip,* 499 U.S. at 9. Thus, any award rendered under a common law scheme lacking fundamental fairness, "no matter how small the amount, is constitutionally infirm." *Id.* at 43-44 (O'Connor, J., dissenting). *See also, Campbell,* 538 U.S. at 416 ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.") (citations omitted).

Moreover, unlike some legal rules, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Haslip,* 499 U.S. at 53 (O'Connor, J., dissenting) (citing *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961)). Rather, due process is flexible and requires the procedural protections demanded by the particular situation. *Haslip,* 499 U.S. at 53 (O'Connor, J., dissenting) (citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). In

determining whether a particular set of procedures is constitutionally adequate, the Supreme Court has adopted a "sliding-scale test" comprised of three factors: "(1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures." *Haslip*, 499 U.S. at 53 (O'Connor, J., dissenting) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

IV. The Texas Supreme Court Has Acknowledged That Federal Due Process Protections Limit the Imposition of Punitive Damages

Given its jurisprudence recognizing that punitive damages awards raise due process concerns, the Texas Supreme Court's denial of Lisanti's Motion for Rehearing is perplexing. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 12 (1994) (framing the issues presented: "Third, what limits do the Due Process clause of the Fourteenth Amendment to the United States Constitution and the Due Course clause of the Texas Constitution, Tex. Const. art. 1, § 19, place on punitive damages?"). Although the *Moriel* Court ultimately followed the well-settled principle that "constitutional challenges should not be addressed when a case may be decided on nonconstitutional grounds," it recognized that the due process issue encompasses not only the size of the punitive damages award challenged, but also whether the attendant procedures violated the defendant's constitutional rights. *Id.* at 13. In *Moriel*, the nonconstitutional ground upon which the Court rested its holding was the legally insufficient evidence that the respondent presented regarding his claim for punitive damages. *Id.* at 12-13.

Several unique characteristics of punitive damages and the thorough factual analysis requisite to their appellate

review formed this holding. First, punitive damages are levied "to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct." *Id.* at 16. Like criminal penalties, punitive damages therefore require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment. *Id.* at 16-17. The Texas Supreme Court opined: "Our duty in civil cases, then, like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment, while at the same time preventing punishment that is excessive *or otherwise erroneous.*" *Id.* at 17 (emphasis added). The Texas Supreme Court's decision to allow the court of appeals' erroneous punitive damages award against Lisanti was inexplicably unfaithful to this tenant of due process.

Second, in light of *Haslip* and *TXO*, the Texas Supreme Court announced the procedural standards applicable to "all punitive damages cases tried in the future." *Id.* at 26-28. Of particular import to Lisanti's due process rights is the Texas Supreme Court's emphasis "that courts of appeals must carefully scrutinize punitive awards to ensure that they are supported by the *evidence.*" *Id.* at 31 (emphasis added). This due process safeguard is of inescapable significance since the Texas Supreme Court "is precluded from reviewing the evidence supporting a punitive damages award for factual sufficiency." *Id.* at 29 (reasoning that "[a]lthough due process does not require two levels of appellate review, this aspect of Texas procedure means that the evidence supporting a punitive award is scrutinized less closely on appeal to the highest court"). Clearly, Respondent's legally inoperative assault cause of action cannot provide factually sufficient evidence to support the trial court's punitive damages award.

V. The Punitive Damages Levied Against Lisanti Are A Constitutionally Impermissible Deprivation of Property

A. Texas Can Have No Legitimate Interest In Assessing Punitive Damages Pursuant to the Indisputably *Abandoned* Assault Cause of Action

Punitive damages operate as private fines to advance governmental objectives. *Haslip*, 499 U.S. at 47 (O'Connor, J., dissenting) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). However, due process prevents courts from adjudicating the merits of nonexistent claims in determining punitive damages. *See Campbell*, 538 U.S. at 423 (foreclosing adjudication on the merits of other parties' *hypothetical* claims against defendants in calculating punitive damages). The record in the case at bar irrefutably establishes, and Respondent concedes, that the only justiciable cause of action against Lisanti is Respondent's *Sabine Pilot* claim. (Appendix H, Tr. Vol. 2, p. 7, ¶¶7-10); ("At the beginning of the case, Respondent's counsel stated that Respondent was not proceeding on the assault claim.") (Appendix G, Respondent's Brief on the Merits, p. 7). As such — quite contrary to the court of appeals' erroneous opinion and the Texas Supreme Court's acquiescence in the same — no government objective is advanced by upholding the trial court's punitive damages award based on Respondent's defunct assault cause of action.

B. Punitive Damages Were Unconstitutionally Levied Against Lisanti

The private interest at stake — $200,000.00 individual liability — is considerable. More critical to the instant petition, however, is the *punitive* nature of that liability, which "means that there is more than just money at stake" and "militates in favor of strong procedural safeguards." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). A necessary corol-

lary focus of Lisanti's petition is "the fairness and reliability" of the procedures pursuant to which he was found liable for punitive damages. *Id.* at 54.

Clearly, a procedure that allows a court of appeals — completely on its own accord — to attribute punitive damages to an abandoned, time-barred claim placed well beyond the grasp of legitimate adjudication is neither fair nor reliable. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that may subject him to punishment but also of the severity of the penalty that the State may impose."). Accordingly, despite the court of appeals' inexplicable contravening whim, Lisanti was entitled to rely on the fact that Respondent was legally barred from subjecting him to liability based on her time-barred assault cause of action. *See id.* at 587 (Breyer, J., concurring) (opining that requiring application of the law rather than the decision maker's caprice provides citizens with notice of actions that may subject them to punishment).

By ignoring the court of appeals' infidelity, the Texas Supreme Court not only condoned the appellate court's illegitimate discretion, but also effectively affirmed the appellate court's arbitrary violation of Lisanti's due process rights. *See id.* at 588 (reasoning that legal standards that do not offer "some kind of constraint upon a . . . court's discretion, and thus protection against purely arbitrary behavior" do not satisfy constitutional concerns). Curing this due process violation was an easy fix. The Texas Supreme Court merely needed to have stated the obvious — Respondent's abandoned assault cause of action cannot support the trial court's punitive damages award — and proceeded to render judgment or remand to the court of appeals to effect a review consistent with the standard set forth in *Moriel*, which was

expressly intended to ensure compliance with *Haslip* and *TXO*. *See Moriel*, 879 S.W.2d at 26-29 (citing *Haslip* and *TXO* in articulating the procedural standards for punitive damages before remanding the case for retrial).

No legitimate governmental interest exists in avoiding these additional procedures, but the Texas Supreme Court nonetheless failed to invoke them to protect Lisanti's constitutional due process rights. As such, Lisanti urges this Court to uphold his rights.

VI. Alternatively, Unless the Texas Supreme Court Clarifies Whether Punitive Damages Are Available for *Sabine Pilot* Violations, The Doctrine Is Void for Vagueness and Violates Constitutional Due Process Protections

"Due process requires that a State provide meaningful standards to guide the application of its laws." *Haslip*, 499 U.S. at 44 (O'Connor, J., dissenting) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Absent such standards, the law is void for vagueness. *Haslip*, 499 U.S. at 44 (O'Connor, J., dissenting). This "void-for-vagueness doctrine" applies to laws that vest standardless discretion to fix a penalty (as implicated by the court of appeals' capricious reliance on the time-barred assault claim to affirm the punitive damage award against Lisanti in violation of his due process rights) as well as to laws that proscribe conduct. *Id.* at 44, 47 ("The constitutional prohibition against vagueness does not disappear simply because the state law at issue originated in the courts, rather than the legislature."). Although the Texas Supreme Court proscribed employers from terminating employees for refusing to commit illegal acts, it expressly reserved judgment on the available measure of damages for violating that proscription. *Sabine Pilot*, 687 S.W.2d at 735, 736. To avoid being potentially struck down as void for

vagueness, constitutional due process considerations require the Texas Supreme Court to fill the vacuum of direction regarding whether punitive damages are available for *Sabine Pilot* violations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gayla C. Crain, a member of the Bar of the Supreme Court of the United States and counsel of record for Joseph Lisanti, Jr., Petitioner herein, certify that this 26th day of May, 2006, pursuant to Rule 29, Rules of the Supreme Court, I served 3 copies of the Petition for Writ of Certiorari and the Appendices to the Petition in the above-entitled case by mail, first class postage prepaid, on Kirk Pittard, Durham & Pittard, LLP, P.O. Box 190310, Dallas, Texas 75219. I further certify that all parties required to be served have been served.

/s/ Gayla C. Crain

Gayla C. Crain

APPENDIX

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APPENDIX A

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12 [ILLEGIBLE]
Austin, Texas 78[ILLEGIBLE]48

RE: Case No. 04-1102
COA #: 05-03-01252-CV
STYLE: JOSEPH LISANTI, JR.
v. SHERRY DIXON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:

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APPENDIX B

Westlaw.

H

Briefs and Other Related Documents

Court of Appeals of Texas, Dallas.
Joseph LISANTI, Jr., Appellant,
v.
Sherry DIXON, Appellee.
No. 05-03-01252-CV.

Sept. 9, 2004.
Rehearing Overruled Oct. 26, 2004.

Background: Former employee brought action against owner of corporate employer, alleging that her employment was terminated because of her refusal to perform an illegal act. The 14th Judicial District Court, Dallas County, Mary Murphy, J., entered judgment in favor of former employee, and owner appealed.

Holdings: The Court of Appeals, Morris, J., held that:

(1) owner could not claim protections of automatic stay of proceedings against corporation imposed by virtue of corporation's bankruptcy filing;

(2) evidence was sufficient to show that former employee was asked to commit insurance fraud;

(3) evidence was sufficient to show that she was fired solely because she had refused to commit insurance fraud;

(4) evidence was sufficient to show that owner was corporation's alter ego; and

(5) award of punitive damages was permitted.

Affirmed.

West Headnotes

[1] Appeal and Error ⚿ 173(2)
30k173(2) Most Cited Cases

[1] Bankruptcy ⚿ 2396
51k2396 Most Cited Cases

Owner of corporation that had filed for bankruptcy could not claim the protections of the automatic stay in wrongful termination action against owner, where corporation did not challenge the proceeding against owner in the trial court on the basis that it violated the automatic stay. Bankr.Code, 11 U.S.C.A. § 362(a).

[2] Bankruptcy ⚿ 2396
51k2396 Most Cited Cases

Generally, the automatic stay of proceedings against debtor imposed by virtue of bankruptcy filing does not extend to parties other than the debtor. Bankr.Code, 11 U.S.C.A. § 362(a).

[3] Bankruptcy ⚿ 2396
51k2396 Most Cited Cases

The automatic stay of proceedings against debtor imposed by virtue of bankruptcy filing may be extended to proceedings against nonbankrupt parties where the assets of the bankruptcy estate would otherwise be jeopardized. Bankr.Code, 11 U.S.C.A. § 362(a).

[4] Bankruptcy ⚿ 2396
51k2396 Most Cited Cases

Automatic stay of proceedings imposed by virtue of bankruptcy filing is for the benefit of the debtor, and nonbankrupt parties cannot use the stay to their advantage. Bankr.Code, 11 U.S.C.A. § 362(a).

[5] Bankruptcy ⊂ 2396
51k2396 Most Cited Cases

Nonbankrupt parties have no substantive or procedural rights in the automatic stay imposed by virtue of bankruptcy filing of proceedings against debtor, or against nonbankrupt parties in order to safeguard the assets of the bankruptcy estate, other than to request their own relief from it. Bankr.Code, 11 U.S.C.A. § 362(a).

[6] Bankruptcy ⊂ 2396
51k2396 Most Cited Cases

If the debtor does not challenge a proceeding on the basis that it violates the automatic stay of proceedings imposed by virtue of bankruptcy filing, then the other parties to the proceeding cannot use the stay for their own protection. Bankr.Code, 11 U.S.C.A. § 362(a).

[7] Labor and Employment ⊂ 863(2)
231Hk863(2) Most Cited Cases

Terminated employee claiming exception to employment-at-will doctrine on the basis that she was discharged for the sole reason that she refused to perform an illegal act has the burden to show by a preponderance of the evidence that her discharge was for no reason other than her refusal to perform an illegal act.

[8] Labor and Employment ⊂ 863(2)
231Hk863(2) Most Cited Cases

Evidence was sufficient to show that vehicle identification numbers (VINs) were material to insurance claims for damage to employer's trucks, supporting former employee's claim in wrongful termination action that she was fired for refusing to commit insurance fraud by falsifying VINs, despite testimony of employer's owner that false VINs were from other insured trucks, and evidence that insurer paid

claim after former employee attempted to alert it about the potentially false VINs. V.T.C.A., Penal Code § 35.02.

[9] Labor and Employment ⊂ 863(2)
231Hk863(2) Most Cited Cases

Evidence was sufficient to establish that former employee had been fired after she refused to falsify insurance claims, supporting her wrongful termination action against former employer; former employee testified that the day after supervisor told her to go home early, she was told by a coworker that she had been fired, that owner of corporate employer told her she was not allowed on the property and could pick up her last check during regular business hours, and that when she attempted to collect her check, she was told it would not be released to her unless she signed a letter stating she had resigned. V.T.C.A., Penal Code § 35.02.

[10] Labor and Employment ⊂ 863(2)
231Hk863(2) Most Cited Cases

Evidence was sufficient to establish that former employee had been fired solely because she had refused to commit insurance fraud, supporting her wrongful termination action against former employer; there was no evidence that employee was fired for reasons such as absences or performance problems, and all defense witnesses testified that she had left her job voluntarily. V.T.C.A., Penal Code § 35.02.

[11] Corporations ⊂ 1.7(2)
101k1.7(2) Most Cited Cases

Evidence was sufficient to show that owner of corporation was its alter ego, making him liable for corporation's actions; evidence indicated that owner controlled corporation and exclusively made all decisions regarding its business, and micromanaged the corporation according to his own personal wishes, corporation lacked adequate capitalization and was

not profitable, and its business was constantly intermingled with the business of owner's other companies.

[12] Corporations ⚿ 1.4(4)
101k1.4(4) Most Cited Cases

The "alter ego theory of liability" applies when there is such unity between the corporation and the individual that the separateness of the corporation has ceased and holding only the corporation liable would be unjust; such unity can be shown where an individual owns or controls the corporate entity and operates the company in a manner indistinguishable from his personal affairs and in a manner calculated to mislead those dealing with him to their detriment.

[13] Corporations ⚿ 1.4(4)
101k1.4(4) Most Cited Cases

An alter ego relationship may be shown from the total dealings of the corporation and the individual, including evidence of the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership, and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.

[14] Labor and Employment ⚿ 870
231Hk870 Most Cited Cases

Punitive damages could be awarded in employee's action against former employer, although her claim for wrongful termination for refusing to commit an illegal act sounded in contract rather than in tort, where trial court found that former employer had physically and verbally threatened former employee, establishing the distinct tort of assault. Restatement (Second) of Torts §21.

[15] Damages ⇦ 89(2)
115k89(2) Most Cited Cases

Even if a breach of contract is malicious, intentional, or capricious, exemplary damages may not be awarded unless the plaintiff alleges and proves a distinct tort.

*640 Jill K. Bramlett, Arthur V. Lambert, Epstein, Becker, Green, Wickliff & Hall, P.C., Dallas, for Appellant.

John E. Schulman, Law Office of John E. Schulman, Kirk L. Pittard, Thurman & Andres, P.C., Mary Alice McLarty, McLarty, Roper, Pope, L.L.P., Dallas, for Appellee.

Before Justices MORRIS and WHITTINGTON. [FN1]

FN1. The Honorable Tom James, Retired, Court of Appeals, Fifth District of Texas at Dallas, was a member of the panel at the time this case was argued and submitted for decision. Due to his retirement from the Court, Justice James did not participate in the issuance of this opinion. *See* Tex.R.App. P. 41.1(a)&(b).

***641 OPINION**

Opinion by Justice MORRIS.

Following a trial to the court without a jury, Joseph Lisanti appeals the trial court's judgment holding him liable for terminating the employment of Sherry Dixon because of her refusal to perform an illegal act. Lisanti brings four points of error arguing first that the judgment violates the automatic stay imposed as a result of the bankruptcy proceedings against Lisanti's codefendants Lisanti Foods and Lisanti Foods of Texas, Inc. Next, Lisanti argues the evidence is legally and factually insufficient to show either that Dixon was terminated for refusing to perform an illegal act or that Lisanti can be held individually liable for her termination as the alter ego of her corporate employer. Finally, Lisanti

argues that Dixon was not legally or factually entitled to punitive damages. Concluding Lisanti's arguments are without merit, we affirm the trial court's judgment.

[1] We first address the issue of the automatic stay. Sherry Dixon brought this suit in April 2001, naming Lisanti Foods, Lisanti Foods of Texas, Inc., New Jersey Trucking, Corp.("NJT") and Joseph Lisanti, Jr. as defendants. In November 2002, Lisanti Foods and Lisanti Foods of Texas, Inc. filed a voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. The filing gave rise to an automatic stay in proceedings against those entities. *See* 11 U.S.C.A. § 362 (West 1993 & Supp.2004). The trial court in this case severed and abated Dixon's claims against Lisanti Foods and Lisanti Foods of Texas, Inc. and proceeded with the case against the remaining defendants, Lisanti and NJT. All four defendants objected to the severance. At no point, however, did the defendants urge the trial court or the bankruptcy court to extend the automatic stay to the proceedings against NJT and Lisanti. [FN2]

FN2. Lisanti contends he and the other defendants alerted the trial court to the need to stay the proceedings against the nonbankrupt defendants in both the Suggestion of Bankruptcy and in their objection to severance of the case. In our examination of those documents, we found no statements, arguments, or evidence that would either support an extension of the stay to the nonbankrupt parties or inform the trial court that such an extension was being sought. At best, the defendants' objection to severance of the case obliquely refers to the fact that the claims against Lisanti and the bankrupt parties may be connected. This alone is insufficient to conclude that the issue of extending the stay to the nonbankrupt parties was presented to the trial court.

The case went to trial against NJT and Lisanti resulting in a verdict in favor of Dixon. The trial court found NJT and Lisanti jointly and severally liable for $100,000 in actual damages and each separately liable for $200,000 in exemplary damages. Lisanti now argues on appeal that the judgment violates the automatic stay imposed by virtue of the bankruptcy filings of Lisanti Foods and Lisanti Foods of Texas, Inc.

[2][3][4][5][6] Under section 362(a) of chapter 11 of the United States Bankruptcy Code, the commencement or continuation of any judicial, administrative, or other proceeding against a debtor is automatically stayed. *See* 11 U.S.C.A. § 362(a). The general rule is that the automatic stay does not extend to parties other than the debtor. *See Bamburg v. Townsend,* 35 S.W.3d 85, 89 (Tex.App.-Texarkana 2000, no pet.). Exceptions to this rule exist under certain circumstances where the assets of the bankruptcy estate would be jeopardized. *Id.* Under those circumstances, ***642** the stay may be extended to proceedings against nonbankrupt parties. *Id.* The stay, however, is for the benefit of the debtor, and nonbankrupt parties cannot use the stay to their advantage. *See Hadsell v. Phila. Life Ins. Co. v. Estate of Fuel Oil Supply & Terminating, Inc. (In re Fuel Oil Supply & Terminaling, Inc.),* 30 B.R. 360, 362 (Bankr.S.D.Tex. 1983). Nonbankrupt parties have no substantive or procedural rights in the stay, other than to request their own relief from it. *See Bryce v. Stivers (In re Stivers),* 31 B.R. 735, 737 (Bankr.N.D.Cal.1983). If the debtor does not challenge a proceeding on the basis that it violates the automatic stay, then the other parties to the proceeding cannot use the stay for their own protection. *See Bamburg,* 35 S.W.3d at 90; *see also, Hanzel v. Herring,* 80 S.W.3d 167, 170 (Tex.App.- Fort Worth 2002, no pet.).

In the trial court, neither Lisanti Foods nor Lisanti Foods of Texas, Inc. urged the proceedings against Lisanti and NJT violated the automatic stay. Accordingly, neither Lisanti nor

NJT can now claim the protections of the stay. We overrule Lisanti's first point of error.

Lisanti next challenges the legal and factual sufficiency of the evidence supporting Dixon's claims arising out of her alleged termination. Specifically, Lisanti argues Dixon failed to prove (1) he asked her to perform an illegal act, (2) she was terminated for refusing to perform an illegal act, and (3) her refusal to perform an illegal act was the sole reason for her termination. The trial court found that Dixon was discharged from her employment for the sole reason that she refused to perform illegal acts, including insurance, mail, and wire fraud in connection with reporting damaged trucks owned by NJT. In a trial to the court, findings of fact are reviewable for factual and legal sufficiency by the same standards as are applied in reviewing the factual and legal sufficiency of evidence supporting a jury's answers to jury questions. *Bolle, Inc. v. American Greetings Corp.*, 109 S.W.3d 827, 831 (Tex.App.-Dallas 2003, pet. denied). When reviewing a legal sufficiency issue, we consider only the evidence and inferences that tend to support the challenged findings and disregard all evidence and inferences to the contrary. *Selectouch Corp. v. Perfect Starch, Inc.*, Ill S.W.3d 830, 834 (Tex.App.-Dallas 2003, no pet.). If there is more than a scintilla of evidence to support the findings, the legal sufficiency challenge cannot be sustained. *Id.* In reviewing a claim of factual insufficiency, we must consider and weigh all the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* We do not substitute our judgment for that of the fact finder, even if we would have reached a different conclusion when reviewing the evidence. *Bolle*, 109 S.W.Sd at 831. In addition, the trial court, as fact finder, is the sole judge of the credibility of the witnesses and she may accept or reject all or any part of a witness's testimony.

Southwestern Bell Media, Inc. v. Lyles, 825 S.W.2d 488, 493 (Tex.App.-Houston [1st Dist.] 1992, writ denied).

[7] Here, Dixon's claim arises under an "exception" to the employment-at-will doctrine recognized by the Texas Supreme Court in *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985). In *Sabine Pilot,* the supreme court held that a plaintiff has a cause of action on which she may recover if she is discharged for the sole reason that she refused to perform an illegal act. *See id.* at 735. It is the plaintiffs burden, however, to show by a preponderance of the evidence that her discharge was for no reason other than her refusal to perform an illegal act. *See id.*

***643** At trial, Dixon and other witnesses testified that Lisanti ordered Dixon to change the vehicle identification numbers on two insurance claims to reflect that trucks registered in Arizona had sustained damage rather than trucks registered in Texas. The reason for the change, according to the witnesses, was that the Arizona trucks were fully insured while the Texas trucks were "self-insured." Several witnesses testified that Lisanti was clear that he wanted the claims changed to falsely reflect that Arizona trucks had been damaged so that he could collect payment from the insurance company. Dixon refused to make the changes and the insurance claim files were given to another employee. A person commits the criminal offense of insurance fraud if, "with the intent to defraud or deceive an insurer, the person causes to be prepared or presents to an insurer in support of a claim for payment under a health or property and casualty insurance policy a statement that the person knows contains false or misleading information concerning a matter that is material to the claim, and the matter affects a person's right to a payment or the amount of payment to which a person is entitled." Tex. Pen.Code Ann. § 35.02 (Vernon Supp.2004-05).

[8] Lisanti argues there is no evidence that the vehicle identification numbers were material to the insurance claims and, therefore, Dixon failed to prove she was requested to perform an illegal act. According to Lisanti, the Texas trucks that were damaged were fully insured, so there was either no reason for him to request that Dixon change the identification numbers or the changed numbers made no material difference to the insurance claims. Lisanti's only evidence that the Texas trucks were insured was his own testimony about the insurance and two insurance payment checks made out to two different Lisanti companies listing the vehicle identification number for one of the Texas trucks. This evidence alone does not show that the identification numbers were immaterial. Lisanti presented no evidence showing what insurance coverage applied to the Texas trucks or whether it was equivalent to the insurance covering the Arizona trucks. There was also no evidence that the trucks registered in Texas were similar to the trucks registered in Arizona.

Lisanti points to the fact that both Dixon and a fellow worker testified they attempted to alert the insurance company about the potentially false vehicle identification numbers on one of the claims and the insurance company paid the claim anyway. In the absence of any information about what the insurance company did with the information it received from Dixon and her coworker or how that information impacted the claim, this evidence is, at best, inconclusive. In short, Lisanti's evidence does not show that the misidentification of the insured property on the insurance claims was a matter that was immaterial to the claims.

[9][10] Lisanti also challenges the sufficiency of the evidence showing that Dixon was fired solely because she refused to put false information in the insurance claims. Lisanti argues both that Dixon was never fired and, alterna-

tively, if she was fired, that it was for reasons other than her refusal to perform an illegal act.

Dixon testified at trial that after she refused to falsify the insurance claims, Lisanti immediately treated her in a hostile manner and began giving her extra work duties. One employee told her she could not refuse to do what Lisanti wanted and keep her job. One day, after confronting one of her supervisors about the work situation, Dixon was told to go home early. When Dixon returned to the office the next day, a coworker asked her what she *644 was doing there. Dixon further testified that another coworker informed her he had been fired "too." According to Dixon, when she finally spoke with Lisanti, he told her she was not allowed on the property and she could pick up her last check during regular business hours. Lisanti also told Dixon that when she returned for her check, she should wait in the lobby. When Dixon attempted to collect her check, she was told it would not be released to her unless she signed a letter stating she had resigned. When Dixon refused to sign the letter, her check was withheld.

Lisanti disputes Dixon's testimony about her termination of employment and challenges her credibility as a witness. As stated above, however, the trial court, as fact finder, is the sole judge of the witnesses' credibility. *See Lyles*, 825 S.W.2d at 493. The trial court was free to accept Dixon's testimony about the facts of her termination and reject Lisanti's testimony that she voluntarily ended her employment. Lisanti also argues that "an abundance of evidence exists sufficient to support legitimate reasons for the termination of Dixon's employment. . . ." Lisanti points to testimony that Dixon had performance problems, including "frequent absences and repeated mistakes performing payroll functions." There is no testimony in the record, however, that Dixon was fired for these reasons. Indeed, all of the defense witnesses consist-

ently testified that Dixon left her employment voluntarily. After reviewing the record as a whole, we conclude the evidence is legally and factually sufficient to support the trial court's finding that Dixon was discharged from her employment solely because she refused to perform an illegal act. We overrule Lisanti's second point of error.

[11][12][13] Lisanti next argues the trial court erred in concluding he was NJT's alter ego and in holding him personally liable to Dixon. Lisanti contends the evidence is legally and factually insufficient to prove Dixon's alter ego theory of liability. The alter ego theory of liability applies when there is such unity between the corporation and the individual that the separateness of the corporation has ceased and holding only the corporation liable would be unjust. *See Goldstein v. Mortenson,* 113 S.W.3d 769, 781 (Tex.App.-Austin 2003, no pet.). Such unity can be shown where an individual owns or controls the corporate entity and operates the company in a manner indistinguishable from his personal affairs and in a manner calculated to mislead those dealing with him to their detriment. *See Mancorp, Inc. v. Culpepper,* 802 S.W.2d 226, 229 (Tex. 1990). An alter ego relationship may be shown from the total dealings of the corporation and the individual, including evidence of "the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes." *See id.* at 228.

The record shows that Lisanti owned and controlled NJT and exclusively made all the decisions regarding NJT's business. Numerous witnesses testified that Lisanti micromanaged the company according to his own personal wishes. Furthermore, witnesses testified that NJT lacked adequate capitalization and even Lisanti conceded the company was

not profitable. The business of NJT was constantly intermingled with the business of Lisanti's other companies. This evidence supports the trial court's finding that there was a unity between NJT and Lisanti such that NJT was no longer a separate entity and holding only the corporation liable would be *645 unjust. There is no evidence that shows this finding to be clearly wrong. Accordingly, we conclude the evidence is both legally and factually sufficient to support the trial court's imposition of liability on Lisanti under an alter ego theory. [FN3] We overrule Lisanti's third point of error.

> FN3. Because we conclude the trial court's alter ego finding is supported by legally and factually sufficient evidence, it is unnecessary for us to address the trial court's finding that NJT was a sham corporation created to perpetrate a fraud.

[14][15] Finally, Lisanti argues the trial court erred in awarding Dixon punitive damages because her claims sounded in contract, rather than tort, and she failed to prove malice. It has long been held that exemplary damages are not allowed for breach of contract. *See Amoco Production Co. v. Alexander,* 622 S.W.2d 563, 571 (Tex. 1981). Even if the breach is malicious, intentional, or capricious, exemplary damages may not be awarded unless the plaintiff alleges and proves a distinct tort. *Id.*

Lisanti's argument focuses on his contention that Dixon's *Sabine Pilot* claim is contractual in nature rather than a tort. Lisanti fails to address, however, the fact that Dixon's petition included a claim for assault. In its findings of fact, the trial court specifically found that Lisanti physically and verbally threatened Dixon. Such threats fall within the definition of the tort of assault. *See* Restatement (Second) of Torts § 21 (1965). Lisanti does not challenge the sufficiency of the evidence supporting the trial court's findings on assault.

Therefore, the trial court's award of punitive damages is supported by a finding of a distinct tort.

Lisanti's arguments regarding the trial court's malice finding similarly focus on Dixon's *Sabine Pilot* claim. In challenging the sufficiency of the evidence, he discusses the elements of malice applicable to retaliatory termination cases. Lisanti fails to address the trial court's finding of malice as it relates to Dixon's assault claim. Because Lisanti failed to address all possible bases supporting the trial court's award of punitive damages, we overrule Lisanti's fourth point of error.

We affirm the trial court's judgment.

APPENDIX C

CAUSE NO. 01-03092-A

SHERRY DIXON	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	OF DALLAS COUNTY, TEXAS
	§	
	§	
LISANTI FOODS ET AL.	§	14TH JUDICIAL DISTRICT

FINAL JUDGMENT

On May 5, 2003 this case was called to trial. At such time, the Court severed the abated case as to Defendants Lisanti Foods and Lisanti Foods of Texas and such case shall proceed under a separate cause number to be obtained by Plaintiff. This case proceeded to trial against the remaining Defendants New Jersey Trucking Corp. and Joseph Lisanti, Jr.

All parties appeared at time of trial and announced ready. A jury having been waived, the case was tried to the Court beginning May 5, 2003 and continuing May 6, 7 and 22, 2003. On May 22, 2003, all parties rested. After considering all of the admissible evidence, the Court finds that judgment should be entered in favor of Plaintiff and against Defendants as set forth herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff SHERRY DIXON shall have and recover of and from Defendants NEW JERSEY TRUCKING CORP. and JOSEPH LISANTI, JR., jointly and severally, the sum of $100,000.00 as damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff SHERRY DIXON shall have and

recover of and from Defendant NEW JERSEY TRUCKING CORP. the additional sum of $200,000.00 as exemplary damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff SHERRY DIXON shall have and recover of and from Defendant JOSEPH LISANTI, JR. the additional sum of $200,000.00 as exemplary damages.

All sums awarded herein shall bear interest at the rate of 10% from date of judgment until paid, with all costs taxed against Defendants.

This is a final, appealable judgment, disposing of all claims of the parties. All relief not expressly granted herein is denied. Plaintiff shall have all writs necessary for enforcement of this judgment.

SIGNED this 23 day of May 23, 2003.

Mary Murphy

Judge Presiding

APPENDIX D

CAUSE NO. 01-03092-A

SHERRY DIXON	)	IN THE DISTRICT COURT OF
	)	
V.	)	
	)	
LISANTI FOODS, LISANTI FOODS INC.,	)	DALLAS COUNTY, TEXAS
LISANTI FOODS OF TEXAS INC.,	)	
NEW JERSEY TRUCKING CORP.	)	
AND	)	
JOSEPH LISANTI JR.	)	14TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. During the period September 10, 1998 through April 23, 1999, Plaintiff Sherry Dixon ("Dixon") was employed by Defendant New Jersey Trucking Corp. (the "Trucking Corp.") as a Safety Director.

2. Dixon was discharged for the sole reason that she refused to perform illegal acts, including insurance, mail and wire fraud, in connection with reporting of damaged trailers owned by the Trucking Corp.

3. Prior to Dixon's termination from the Trucking Corp., she was physically and verbally threatened by Defendant Joseph Lisanti Jr. ("Lisanti"). She was also told by another employee that she could not keep refusing to follow Lisanti's requests and keep her job. She was told that lying was part of her job.

4. At the time Dixon was terminated, Lisanti and one of his employees who worked for another Lisanti entity tried to make it appear that Dixon had quit. Her last paycheck was

also withheld and her health benefits terminated because she refused to sign a release.

5. At the time Dixon was terminated, Lisanti and his employees knew that Dixon's young son was critically ill and needed surgery.

6. As a result of Lisanti's conduct and that of other management employees acting on behalf of the Trucking Corp. at Lisanti's instructions, Dixon suffered lost wages and benefits and severe emotional distress requiring medical treatment.

7. The Trucking Corp. is owned and controlled by Lisanti. There is no board of directors, the company was undercapitalized from the beginning and has never operated at a profit. The business of the Trucking Corp. was not kept separate from Lisanti's other companies Lisanti Foods Inc. and Lisanti Foods of Texas Inc., both of which were placed into bankruptcy during the pendency of this case and Lisanti was evicted by the bankruptcy trustee from the business operations of such companies. As a result, Lisanti was estopped from entering the business premises of Trucking Corp. as well. The employees of the Lisanti Foods entities were interchangeable with those of the Trucking Corp. Lisanti also micromanaged the company and required his employees to commit illegal and/or immoral acts for his ultimate personal benefit.

8. Lisanti forced drivers to run trucks at loads exceeding the legal limit which posed a threat to the public.

9. Lisanti verbally assaulted employees, including Dixon, and bragged about those employees who lied under oath for him. He even admitted stating that he wished one individual would die of cancer.

10. After being terminated, Dixon was diligent in seeking employment and was successful in securing new employment within a couple of months.

11. Dixon's actual damages for lost income and benefits and her extreme emotional distress resulting from the above acts are found to be $100,000.00.

12. Lisanti's conduct individually and as the owner and person who controlled the affairs of the Trucking Corp. exceeds all bounds of decency, constitutes malice and gross disregard for the rights of Dixon, for which exemplary damages are appropriate and just.

13. Awards of $200,000.00 against Lisanti and $200,000.00 against the Trucking Corp. for exemplary damages are just and appropriate considering the conduct in issue, the luxury in which Lisanti lived, the condition in which Defendants forced Dixon to work and in which they left her stranded without funds to pay for her child's needed surgery, and which, considering the situation and sensibilities of the parties, is necessary to punish and deter further conduct of the nature exhibited by such Defendants.

CONCLUSIONS OF LAW

1. Dixon was wrongfully terminated in violation of Texas law. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

2. Dixon is entitled to an award of her actual damages resulting from the conduct of Defendants.

3. Dixon mitigated her damages by seeking and finding new employment.

4. The Trucking Corp. is the alter ego of and/or a mere conduit for Lisanti to avoid liability and to perpetrate frauds. The activities of the Trucking Corp. and Lisanti's other com-

panies is so blended that the public would become confused as to which company was doing the activity in question, especially in light of the interchangeability of employees. Trucking Corp.'s undercapitalization and inability to pay a judgment in effect transfers the risk of loss to Dixon and other members of the public who have dealings with Defendants. Lisanti's use of Trucking Corp, to perpetrate illegal acts and fraud, for which Dixon was fired for refusing to perform, further justifies piercing the corporate veil. The facts of this case demonstrate exceptional circumstances that justify piercing the corporate veil to hold Lisanti responsible for his wrongful acts.

5. The conduct of Defendants justifies an award of exemplary damages under Texas law in the maximum amount allowable.

SIGNED this 21 day of July, 2003.

Mary Murphy

Judge Presiding

APPENDIX E

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12 [ILLEGIBLE]
Austin, Texas 787 [ILLEGIBLE] 8

RE: Case No. 04-1102
COA #: 05-03-01252-CV
STYLE: JOSEPH LISANTI, JR.
v. SHERRY DIXON

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MS. GAYLA C. GRAIN
EPSTEIN BECKER GREEN WICKLIFF & HALL P
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APPENDIX F

Order issued October 26, 2004

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-03-01252-CV

JOSEPH LISANTI, JR., Appellant

V.

SHERRY DIXON, Appellee

ORDER

Before Justices Morris and Whittington

Appellant's September 23, 2004 Motion for Rehearing is **DENIED**.

JOSEPH B. MORRIS
JUSTICE

APPENDIX G

IN THE SUPREME COURT OF TEXAS

NO. 04-1102

JOSEPH LISANTI, JR.,

Petitioner,

v.

SHERRY DIXON

Respondent.

ON REVIEW FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT OF TXAS AT DALLAS

RESPONDENT'S BRIEF ON THE MERITS

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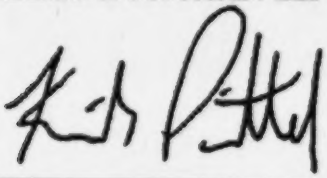
4:22). Shocked by this turn of events, Dixon asked Lisanti for her paycheck. (RR 4:22). Lisanti refused to give Dixon her paycheck, suggesting that her paycheck had been locked up in a safe that he could not open on Saturday. (RR 4:22). Dixon pleaded with Lisanti for her paycheck, reminding Lisanti that her son was soon scheduled for a major kidney surgery. (RR 4:22). Lisanti callously told Dixon there was nothing he could do and that she would have to come back Monday to get her paycheck. (RR 4:22). Dixon left the office and returned on Monday; however, she was still not provided with her paycheck. (RR 4:27-28). In fact, Dixon did not receive her paycheck until mid May. (RR 4:29). The delay in receiving her paycheck interfered with her son's surgery. (RR 3:89-90).

In addition to the causes of action Dixon asserted against Lisanti related to her *Sabine Pilot* cause of action for wrongful termination for refusing to perform an illegal act, Dixon also asserted a claim for assault. (CR 28, 34). **At the beginning of the case, Dixon's counsel stated that Dixon was not proceeding on the assault claim. (RR 2:7).** Nevertheless, in the trial court's findings of fact, the court found that Lisanti had assaulted Dixon. (CR 121, 122). The trial court also found that Lisanti acted with malice towards Dixon. (CR 123). Lisanti did not file a request for additional or amended findings of fact. Lisanti also did not raise the issue or challenge the trial court's finding of fact regarding assault in a motion for new trial. *(See* CR 103-108). Additionally, Lisanti did not raise a point of error in the court of appeals regarding this finding by the trial court. The first time

Respectfully submitted,

DURHAM & PITTARD. LLP



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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of June, 2005, a true and correct copy of the Respondent's Brief on the Merits was forwarded by certified mail to counsel for Petitioner, addressed as follows:

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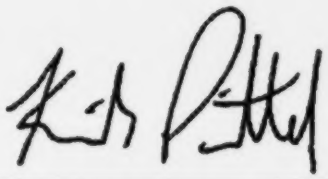

Kirk L. Pittard

APPENDIX H

REPORTER'S RECORD

VOLUME 2 OF 6 VOLUMES

TRIAL COURT CAUSE NO. 01-03092-A

SHERRY DIXON	)	IN THE 14TH JUDICIAL
	)	
vs.	)	DISTRICT COURT OF TEXAS
	)	
NEW JERSEY TRUCKING	)	
CORPORATION AND	)	
JOSEPH LISANTI, JR.	)	IN AND FOR DALLAS COUNTY

NON-JURY TRIAL

On the 5th day of May, 2003, the following proceedings came on to be heard in the above-titled and numbered cause before the Honorable Mary Murphy, Judge Presiding, held in Dallas, Texas, reported by machine shorthand utilizing computer-aided transcription.

Renee' Carroll, CRS, RPR
14th District Court, Dallas, Texas

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Attorneys for Defendants,
New Jersey Trucking Corporation
and Joseph Lisanti, Jr.

In this case, Your Honor, Sherry Dixon also asserts that Mr. Joseph Lisanti, Jr., in the course of insisting that she commit this fraud at one point in time, backed her up against the wall at the women's restroom, screamed foul curses at her, and appeared to Ms. Dixon very reasonably that he might strike her. **Now, Your Honor, we are going to concede, however, that we are not proceeding on the separate assault case, the separate tort of assault, because of limitations issues.**

The evidence will also show, Your Honor, that Sherry Dixon was the safety director of New Jersey Trucking between September 10th, 1998, and April 23rd of 1999. In that time, Your Honor, Ms. Dixon gradually learned that the corporate culture of the two companies that were there physically located in Irving, Texas — that was Lisanti Foods of Texas and New Jersey Trucking — was consistently antisocial and that illegal practices were common. She tried her very best to avoid the expectation of illegal conduct.

For example, earlier in her employment, she was directed to backdate and falsify some safety training records that were pertinent to another piece of litigation, and she just didn't do it.

tr. vol. 2, p. 7, ¶¶ 7-10

William Sefton — 05/05/03
Direct Examination by Ms. McLarty

foul language did he use?

A. Well, he used — I heard the F word constantly. I heard the word — starts with a C and ends up sucking. The word "stupid" was used to employees.

Q. Did you ever overhear him say anything derogatory or profane to women —

A. Uh —

Q. that worked for him?

A. Yeah. There was one lady — I forget her name, I think it was Kim — that actually quit because I think she was called a fat ass. And if I recall correctly, she was — when she was — I know she was crying. I think she quit over it. I know that was in the front office.

Q. **As to Sherry Dixon, did you ever hear him cursing at her?**

A. **We all kind of heard that.**

MR. LAMBERT: Object to the relevance of this testimony. With the assault charge gone, what's the point of what his language was? None of this is illegal unless they're going to bring an expert up to testify to that.

THE COURT: Response.

MS. McLARTY: Your Honor, we have a mental anguish claim here, and it's totally relevant.

THE COURT: Overruled.

tr. vol. 2, p. 70, ¶¶ 16-21, p. 70, ¶¶ 25-p. 71, ¶¶ 2

Renee' Carroll, CRS, RPR
14th District Court, Dallas, Texas

Q: (By Ms. McLarty) Did you ever hear him cursing at Sherry Dixon?

A: Uh, yes.

Q. Now, getting back to this accident. What do you remember about the sequence of events having to do with that accident?

A. Uh, it was a long time ago. The best that I recollect is after the accident was reported, Sherry and the gentleman that was in charge of the PacLease program, which is where Joe leased his tractors through, took a trip out to — it was in East Texas, I think it was Terrell — to observe the damage and see what they could do, you know, by legalities, to take the report and all that. And then the report was — I mean, the trailer burned clear down to the metal.

Q. Did you ever see any photos of the burned trailer?

A. No, but I actually saw the trailer after it was pulled back to the yard.

Q. What do you recall of the events having to do with whether the trailer was actually insured or not?

A. Well, at first I — I knew nothing. I just

STATE OF TEXAS
COUNTY OF DALLAS

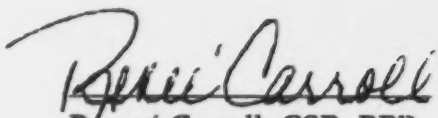
I, Renee' Carroll, Official Court Reporter in and for the 14th District Court of Texas in and for Dallas County, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties, if requested.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid/will be paid by _____.

Renee' Carroll, CRS, RPR
14th District Court, Dallas, Texas

WITNESS MY OFFICIAL HAND, on this 21st day of September, 2003.



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